

## **Interim Determination in respect of reference ADP20**

*(following a Hearing held at Central House, Euston on 24<sup>th</sup> January 2007)*

### **The Panel**

**John Czyrko:** elected representative for Franchised Passenger Class, Band 2  
**Elaine Davies:** elected representative for Non-Franchised Passenger Class  
**Lindsay Durham:** elected representative for Non-Passenger Class, Band 2  
**Mike Scott:** appointed representative of Network Rail

Panel Chairman: **George Renwick**

### **Brief Summary of the Dispute**

1. The Panel was asked, in a joint reference from First Greater Western Ltd (“FGW”) and Network Rail Infrastructure Limited (“Network Rail”), to determine which Notification Factor should be used in the calculation of Schedule 4 compensation payments payable in respect of certain Restrictions of Use (“ROUs”), taken in weeks 1 to 24, in Financial Year 2006/7.
2. ROUs generally require timetabled train services to be retimed, curtailed, diverted or cancelled for the duration of the restriction. Schedule 4 of the applicable Track Access Contracts between Network Rail and each of First Great Western, First Great Western Link and Wessex Trains provides for compensation to be payable to the Train Operators in respect of the interruption to services arising out of ROUs. The amount of compensation is determined by a complex formula, one element of which (the Notification Factor (“NF”)) varies the overall cash payment by reference to the length of advance notice given for each individual ROU.
3. The period of notice is measured by reference to the first day on which an ROU is due to take place (*“the Restriction of Use Day”*), and therefore the first day on which an amended timetable will take effect. Under the so-called “Informed Traveller” objectives, anybody making enquiries about times of trains on a future date, or seeking to book tickets or reservations, should be able to do so in the reasonable expectation that the journey details will not subsequently be changed. To give this degree of certainty, and to enable Train Operators to run systems (such as those that supply travel information to passengers or can take advance bookings), details of services must be *“entered into the train service database”* sufficiently far in advance of the date of travel.
4. The Rail Regulator, in the 2001 amendment to Condition 9 of Network Rail’s Network Licence, has incorporated (in paragraph 2) the obligation that *“the licence holder [Network Rail] shall (a) plan its renewal, maintenance and enhancement of the network in a timely and efficient manner to enable it to specify its requirements for temporary changes to the national timetable (except in respect of changes arising from emergencies or severe weather conditions) so that the procedures to revise the national timetable in respect of such changes can be completed not less than 12 weeks prior to the date of any such change, and (b) provide access to information...in relation to all such changes to the national timetable not less than 12 weeks prior to the date such changes are to have effect”*.

5. Condition 4 (Timetabling), of the Passenger Train Operator's licence, requires that *"The Licence operator shall provide Network Rail with such information about licensed activities as may be reasonably necessary for Network Rail to fulfil any obligation on it under the Timetable Condition"*.
6. Schedule 4 of the Passenger Track Access Contract provides a compensation mechanism which incentivises the parties (more particularly Network Rail) to fulfil these obligations. The eventual level of compensation payment in respect of any one ROU, as it affects any one train Service Group, is calculated first by reference to the magnitude of the amendment to services, and is then discounted by the application of one of three Notification Factors; these Factors, which are specific to each Service Group are listed in columns C, D and E in Annex A to Schedule 4. Paragraph 4 [of Part 3] of Schedule 4 sets out the pre-conditions that must be met for a particular Notification Factor to be applied. Paragraph 5 sets out the default position where none of these preconditions is met.

#### **4. "Notification Factors"**

##### *4.1 Early notification*

*The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column C of Annex A to this Part 3 if and to the extent that:*

- (a) the Network Rail Restriction of Use is reflected in the First Working Timetable; or*
- (b) (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before the end of the Drafting Period in the Applicable Rules of the Route for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the First Working Timetable; and*
  - (ii) subject to paragraph 4.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 2200 hours on the day which is 12 Weeks before the Restriction of Use Day; or*
  - (iii) where paragraph 4.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.*

##### *4.2 Notification by Revision Notification Date*

*The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column D of Annex A to this Part 3 if and to the extent that paragraph 4.1 does not apply, and:*

- (a) details of the Network Rail Restriction of Use are notified to the Train Operator by the Revision Notification Date; and*
- (b) (i) the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 2200 hours on the day which is 12 weeks before the Restriction of Use Day; or*

- (ii) where paragraph 4.2(b)(i) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

#### 4.3 Late Notification

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column E of Annex A to this Part 3 if and to the extent paragraphs 4.1 and 4.2 do not apply but the Network Rail Restriction of Use is reflected in the Applicable Timetable, and includes where paragraph 4.1(b) or paragraph 4.2 would have been applicable but for a failure by Network Rail to fulfil the terms of paragraph 4.1(b)(ii) or paragraph 4.2(b)(i) respectively, notwithstanding the Train Operator having given a Revised Bid in accordance with Condition D4.8.3.

7. Common industry parlance is to refer to the week of prospective travel as T, and therefore to categorise earlier weeks as T-4, T-12 etc. This convention is followed in this determination, and the key proceeding defined in Schedule 4 (“the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 2200 hours on the day which is 12 weeks before the Restriction of Use Day.”) is referred to as “upload to TSDB at T-12”.

#### The Contentions of the Parties

8. FGW stated that during periods 1-6 of 2006/7 Network Rail had generally applied the column C Notification Factor to the calculation of Schedule 4 Compensation. This, FGW contended, was incorrect, as Network Rail had regularly failed to achieve “upload to TSDB at T-12” and should therefore have applied, in most instances, the column E Notification Factor to the calculation. FGW went on to state that it had challenged Network Rail on a week-by-week basis, in accordance with the provisions of paragraph 8 of Schedule 4, which deals with the payment procedures and dispute resolution.
9. Furthermore, FGW was particularly concerned that Network Rail
- 9.1. had been reluctant participants in the dispute resolution procedures prescribed in paragraph 8.4 of Schedule 4;
  - 9.2. had failed to settle compensation sums that had been agreed; and
  - 9.3. had only belatedly raised arguments that, it was now contending, laid some of the responsibility for missed deadlines on FGW, a charge that FGW rejected.
10. Network Rail, in defending its decision to apply in most instances the column C Notification Factor, contended that operation of Schedule 4, and the determination of the correct Notification Factor, required the Parties to observe all the provisions of Condition 4.8 “**Supplemental Timetable Revision Process**” of the Network Code. The behaviour of FGW, in the manner that it had conducted its part in those procedures, had placed impossible burdens upon Network Rail that had directly frustrated Network Rail’s ability to conclude the Supplemental Timetable Revision Process within the T-12 timeframe. In particular, the manner in which FGW had submitted nominal Revised Bids had been drawn out, and subject to many supplements and second thoughts, and did not comply with the provisions of Condition D3.3 “Contents of a Bid”. In consequence, it was

reasonable for Network Rail to consider that, in many instances, FGW bids were not valid, and that FGW had *de facto* “failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3” (paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Schedule 4).

11. Furthermore, Network Rail argued, FGW had “failed [on occasion] to give Network Rail a Revised Bid in accordance with Condition D4.8.3”, and that, in consequence, Network Rail was entitled to the protection of paragraphs 4.1(b)(iii), or 4.2(b)(ii) of Schedule 4 which, it contended, meant that Network Rail was entitled to apply the column C, or column D Notification Factors.

### **The Chairman’s directions and the jurisdiction of the Panel**

12. The Parties’ joint submission to the Panel invited the consideration of a series of individual assertions and rebuttals of points of principle, and the respective representations of the detailed happenings of each of 24 weeks of Supplemental Timetable Revision presented both in aggregate and detail.
13. Having considered the initial submissions, the Panel Chairman, in fulfilment of the provisions of Rule A1.4(c), wrote to the parties on 19<sup>th</sup> January 2007 with a view to clarifying certain issues of procedure, and also of principle. In respect of procedure he proposed as follows

4. “The joint submission states that “*This matter is referred to an Access Disputes Panel (“the Panel”) for determination in accordance with paragraph 8.4(d) of Part 3 of Schedule 4 of each of the contracts referred to in paragraph 2.1*”. If it is heard by an Access Disputes Panel any appeal against the Panel’s determination would be to arbitration, under the terms of paragraph 8.4 (e).
5. Some of the arguments advanced by both parties relate to the effect, and applicability, of Condition D4.8 of the Network Code, and the extent to which either Party has complied with its provisions. As you will be aware, where a dispute relates to the operation of Part D, the combined effect of Condition D5 and ADR Rule A1.14 is that it should normally be allocated to a Timetabling Panel. Any appeal would then be to the Office of Rail Regulation (under the terms of Condition D 5.2).
6. In this instance, as the Parties themselves have sought a determination by an Access Disputes Panel, I consider that there are grounds for exercising the discretion implied by Rule A1.14 that an Access Disputes Panel may be allocated “*a dispute ostensibly falling within Condition D5.1.1*”. However, I propose that determination of this dispute should be handled in three distinct stages.
  - 6.1. The Panel at its first meeting will consider all the relevant provisions of Schedule 4 of the Track Access Contract, and of Part D of the Network Code, in order to establish what they mean, what they require each party to do and what, in principle, are the potential consequences of either party failing to do it. I envisage that the outcome may well be a first determination.
  - 6.2. The next stage will be to establish, on the facts, whether and to what extent each party did what it was supposed to have done. This is a necessary preliminary to determining which Notification Factor should apply, and will require the Parties to review the evidence that they have assembled in the light of the initial determination at 6.1 above.
  - 6.3. The third stage will be to determine the compensation payable.
7. This approach is likely to have the result that a final determination of all matters raised will be deferred beyond Wednesday’s hearing. However, by adopting this approach, I am seeking to

protect the interests of both parties, and in particular their rights, should they be dissatisfied with the outcome of the hearing, to take matters in relation to Part D on appeal to the Office of Rail Regulation, and those in relation to Schedule 4 to arbitration.

8. I propose that, at the outset of proceedings on Wednesday, both parties will be given the opportunity to make any oral representations (which may have been preceded by written representations) on the hearing process. These will then be considered before the parties are invited to make their cases in respect of the main business. For the avoidance of doubt, I will construe any failure to make a representation, or any “reserving of a position”, as tacit acceptance of the proposal”.

14. Both parties responded, in writing and in their comments presented at the hearing, that they were content to have this dispute progressed in accordance with these proposals.
15. In the last part of his letter of 19<sup>th</sup> January 2007 the Panel Chairman also asked the Parties to respond to the following questions in respect of ***Matters of Principle relating to the Entitlements of the Parties:***

12. In their opening remarks at the hearing, the parties are asked to present arguments which will enable the Panel to reach conclusions on each of the following questions.
13. **Schedule 4, Part 3 paragraph 4:** the three levels of Notification Factor result in three different amounts of compensation payment from Network Rail to the Train Operator. Is the onus -
  - 13.1. on the Train Operator, as the party claiming compensation, to show that the applicable Notification Factor is that under paragraph 4.3, rather than 4.2 or 4.1, or 4.2 rather than 4.1? In other words, unless the Train Operator can make the case, the “default” paragraph always results in a lower level of compensation; or
  - 13.2. on Network Rail to show that it has fulfilled its obligations and that the applicable paragraph is 4.1, or failing that 4.2? In other words, unless Network Rail can demonstrate otherwise, the “default” paragraph produces a higher level of compensation.
14. **Condition D4.8:** this Condition (as further amplified by the provisions of the National Rules of the Plan, as described in Paragraph 6.2.2.2 of the joint submission) lays down a timetable of actions on both Network Rail and the Train Operator, in terms of both tasks that have to be undertaken, and deadlines that have to be met. What action is Network Rail (i) entitled, and (ii) required to take if a Train Operator -
  - 14.1. fails to join in a process of consultation under paragraph 4.8.2.(b); or
  - 14.2. fails to submit a revised bid under paragraph 4.8.3; or
  - 14.3. submits a bid which does not comply with Condition D3.3 or is in some other respect incomplete or inadequate; or
  - 14.4. fails in any other respect, to do what is expected of it?
15. **Deadlines:** Where a deadline in the Supplemental Timetable Revision Process is not met, must the other Party seek to make up the time lost, or has it the right to cause the next deadline to slip back an equivalent amount (in other words, if say a task due to be completed at T-22 is not completed until T-20, can the other Party claim that the reply, due at T-18, need not be submitted until T-16)?

16. How much freedom of action does **Condition D4.8.6** give to Network Rail to achieve its obligations in respect of the T-12 Upload deadline, irrespective of the content, quality or timeliness of the Revised Bids from a Train Operator?
17. Taking account of the content of Appendix 4.13 (j), is there any contractual provision that entitles a Party to be relieved of all or some of its obligations to the other Party (e.g. in respect of comprehensiveness of information, or adherence to deadlines) in circumstances where it has not employed, or deployed, adequate numbers and quality of **Resources** to meet those obligations?

16. In the course of the initial presentations each Party addressed these questions, drawing together strands of argument that had already been set out in the earlier Joint Submission. These were taken into account by the Panel in formulating its view on how best to progress the matter in the light of both procedural matters, and the substance of the arguments.

### **The Panel's conclusions in respect of procedure**

17. The Panel found that

17.1. the final determination of this dispute would need to be on the basis of the facts of each individual Timetable Week, when set against the Parties' respective Informed Traveller obligations set out in Schedule 4 and Condition D; and that

17.2. the Parties were largely in agreement as to the importance of the Informed Traveller timescales, the need to adhere to the processes laid down in Network Code Condition D4.8, and the fact that those processes were directly relevant to determining the applicable Notification Factor; however,

17.3. each Party differed in its understanding of the detail of those processes.

18. The Panel acknowledged that fulfilment of any of the provisions of Schedule 4 depended upon the Parties' compliance with Condition D4.8 "**Supplemental Timetable Revision Process**" of the Network Code, which sets out the practical train planning procedures that govern the incorporation of ROUs, and associated changes to train services, into the Working Timetable. The provisions of this Condition prescribe a schedule of actions, by both Network Rail and the Train Operators, such that on the Revision Period End Date (i.e T-12) it is feasible to enter into the TSDB the details of the services to run in 12 weeks' time.

19. The Panel noted that the Parties, in advancing their respective arguments, made reference to matters of "custom and practice", "the normal course of events", "what other companies do" or "reasonable behaviour", as ostensible grounds for qualifying obligations in either Part D or Schedule 4, and it acknowledged that train planning, in relation to engineering works, was an activity where there were many customs and practices which still influenced the behaviour of practical operators. There was an element, in the submissions of both Parties, that such "custom and practice" was evidence of what one or other contended constituted "reasonable behaviour".

20. The Panel agreed that custom and practice might indicate what constituted "reasonable behaviour", and recognised that in certain circumstances the obligations of parties to a written contract may be varied by a subsequent course of conduct between them amounting to custom and practice. However, in the present case, the obligations of the parties were contained in regulated agreements, which in Schedule 4 and Condition D4.8 set down in explicit terms the processes to be observed to deliver Informed Traveller objectives. It followed therefore that a determination "*on the facts*,

*whether and to what extent each party did what it was supposed to have done*" (letter from Chairman of 19<sup>th</sup> January) involved a strict interpretation of the provisions of Schedule 4 and Condition D4.8, *"on the basis of the legal entitlements of the dispute parties and upon no other basis"* (Rule A1.18), so as to arrive at a conclusion unaffected by considerations of past custom and practice.

#### **Issues considered by the Panel in respect of Schedule 4**

21. The Panel confirmed that its initial determination would focus on the interpretation of the meaning of Schedule 4, with a view to providing the Parties with sufficiently clear guidance that, when applied to the facts relating to the contested weeks, would enable them to reach a common understanding.
22. Paragraph 4 of Schedule 4 defines how the actions of the Parties, in relation to the way in which they each fulfil obligations, affect the actual level of compensation payable. Expressed in terms of what happens in practice
  - 22.1. The lowest level of compensation (derived from the smallest Notification Factor (column C in Annex A)) is payable (Schedule 4, paragraph. 4.1) when
    - 22.1.1. details of the ROU were known, notified to the Train Operator, and reflected in the First Working Timetable (which would have the result that consequential revisions to train services were incorporated into the TSDB) (paragraph 4.1(a)); OR
    - 22.1.2. details of the ROU were known, and notified to the Train Operator at the time of publishing the First Working Timetable, but the Train Operator decided that the changes required should not be incorporated into the First Working Timetable but rather kept back to be published in the context of Informed Traveller (paragraph 4.1(b)). Nevertheless
      - 22.1.2.1. "upload to TSDB at T-12" still has to be achieved, unless
      - 22.1.2.2. "upload to TSDB at T-12" *"does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3" but "the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day"* (Schedule 4 Paragraph 4.1(b)(iii)). (The *"Applicable Timetable"* on any day is that that is in the TSDB by 2200 hours the previous day).
  - 22.2. The intermediate level of compensation (derived from the middle Notification Factor (column D in Annex A)) is payable (Schedule 4, paragraph 4.2) when
    - 22.2.1. details of the ROU were notified to the Train Operator by the *"Revision Notification Date"* [a term excised from the definitions in the applicable version (Yellow Pages of 16<sup>th</sup> October 2005) of Part D but defined in Note 7: *"with effect from 4 May 2005 any reference in any Access Agreement to the Revision Notification Date shall be interpreted as a reference to the date on which Network Rail notifies bidders in accordance with Condition D4.8.2(c)(ii)"*, in other words T-22]. Again
    - 22.2.2. "upload to TSDB at T-12" still has to be achieved, unless
    - 22.2.3. "upload to TSDB at T-12" *"does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3" but "the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day"* (Schedule 4, paragraph 4.2(b)(ii)).

- 22.3. The highest level of compensation (derived from the largest Notification Factor (column E in Annex A)) is payable (Schedule 4, paragraph 4.3) when
- 22.3.1. neither paragraph 4.1 (the lower level, based on column C) nor paragraph 4.2 (the intermediate level based on column D) applies, but
- 22.3.2. *“the Network Rail Restriction of Use is reflected in the Applicable Timetable.”*
- 22.4. If none of the conditions set out in Schedule 4 paragraphs 4.1 to 4.3 applies, paragraph 5 prescribes that *“if and to the extent that a Network Rail Restriction of Use is not reflected in the Applicable Timetable for the Restriction of Use Day, the amount of compensation (if any) shall be calculated in accordance with Schedule 8 (to the exclusion of any compensation under Schedule 4)”*.
23. The Panel noted that the Parties had both placed significant weight on the interpretation of the word “because” in Schedule 4, paragraphs 4.1(b)(iii) and 4.2(b)(ii).
- 23.1. Network Rail argued that if there was no adequate Revised Bid, then *“the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3”*; this fulfilled the only necessary condition to allow Network Rail the benefit of Schedule 4, paragraphs 4.1(b)(iii) and 4.2(b)(ii), and therefore it would only need to achieve “upload to TSDB” before the Restriction of Use Day (rather than by T-12), to receive the benefit of a Notification Factor from column C or D.
- 23.2. FGW argued that even if it could be demonstrated that “the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3”, this was not a sufficient qualification, but that Network Rail should be required to demonstrate that any such failure was the direct cause of the non-achievement of “upload to TSDB at T-12”.
24. The Panel found that
- 24.1. **the column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Schedule 4, whatever the shortcomings of the Train Operator. If they do not (for example, because the ROU was not reflected in the First Working Timetable, and this was not because of a request by FGW that it should not be) Network Rail cannot claim the benefit of column C. Similarly, Network Rail cannot claim the benefit of column D unless the facts of the case fit the wording of paragraph 4.2.**
- 24.2. in the present case, the Panel is required to determine what, in the provision *“because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3”*
- 24.2.1. is the practical meaning of the word “because”; and what
- 24.2.2. are the circumstances in which it can be said that a Train Operator *“has failed to give Network Rail a Revised Bid”*.
25. **The use of the word “because” in paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Schedule 4 to the Track Access Contract means that the column C (or column D, as the case may be) Notification Factor applies only where Network Rail’s failure to upload to TSDB by T-12 has been directly caused by the Train Operator’s failure to submit a Revised Bid by T-18 (taking account of all that is said later in this determination). This is to be tested through a “but for” test: would Network Rail have been able to “upload to TSDB at T-12” “but for” the Train Operator’s**



failure to submit a Revised Bid? This test would not be satisfied if it appeared that the true cause was a complete failure of Network Rail's systems; Network Rail would not have been able to achieve "upload to TSDB at T-12" anyway. It would be unlikely to be satisfied if what the Train Operator had prepared and intended as a Revised Bid failed to qualify as such only because it was submitted, say, a day late: in this instance tests of reasonableness would apply, in relation to which party is actually in a position to control events. This question, and the characteristics of adequate (and failed) Revised Bids, are an important part of the Panel's consideration of Condition D4.8.2 below.

26. On the fundamental question (first posed in the Chairman's letter) as to where the onus of proof lay as to the Notification Factor to apply, each Party was of the view that the burden lay on the other; Network Rail considering that FGW needed to prove that Network Rail had not fulfilled the terms necessary to qualify for the column C factors; FGW maintaining that Network Rail had to be able positively to demonstrate that it had earned the column C level.
27. The Panel considered that **Schedule 4, and in particular paragraphs 5 and 4, are drafted on the basis that**
  - 27.1. **all ROUs require Network Rail to pay compensation to the Train Operator:**
  - 27.2. **the extent to which the compensation factor is reduced by one Notification Factor rather than another depends largely on steps to be taken by Network Rail; accordingly**
  - 27.3. **the onus of proof is on Network Rail to demonstrate that those steps were taken to justify application of a particular NF.**

#### **Issues considered by the Panel in respect of Condition D4.8 'Supplemental Timetable Revision Process'**

28. The Panel considered that its interpretation of Schedule 4, paragraph 4 depended for its practical application on the Panel providing determinative answers to the following questions:
  - 28.1. what is a Revised Bid?
  - 28.2. is a Bidder obliged to submit a Revised Bid after receiving a notification from Network Rail in accordance with Condition D4.8.2(c)(ii)?
  - 28.3. what information should a Revised Bid contain?
  - 28.4. is a Train Operator entitled to amend a Revised Bid; if so, what is the consequence?
  - 28.5. in which possible circumstances may Network Rail conclude that a Revised Bid that it has received has not been "*properly submitted*"? In such circumstances, would this mean that "*the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3*"?
  - 28.6. what therefore are the circumstances that might satisfy the "but for" test in relation to the force of "because" in Schedule 4, paragraphs 4.1(b)(iii) and 4.2(b)(ii), discussed in paragraph 25 above?

### **What is a Revised Bid?**

29. "Bid" is defined in Part D in two ways, namely it "means any Train Slot included in the Base Timetable (to the extent not varied or withdrawn by any subsequent Bid) or any bid made to Network Rail for one or more Train Slots (comprising, as the case may be, the notifications (if any) made in accordance with Conditions D3.2.1, D3.2.4 and D3.2.6, any Spot Bid or any Revised Bid)".
30. "Spot Bid" is therefore a subset of "Bid" and defined as "any Bid (other than a Revised Bid) made during the Timetable Period to which that Bid relates or during the Supplemental Period immediately prior to the Timetable Period".
31. Notwithstanding the definition of "Spot Bid", "Revised Bid" is, for practical purposes, a subset of "Spot Bid", defined as modifying an existing Train Slot ("...any Spot Bid seeking to revise a Train Slot scheduled in the Working Timetable"), and the product of a specific process ("as submitted to Network Rail by a Train Operator in accordance with Condition D4.8.3").
32. Condition D4.8.3 qualifies the definition of a Revised Bid in three important respects. A Revised Bid
- 32.1. "follow[s] receipt of notification from Network Rail under Condition D4.8.2(c)(ii);
  - 32.2. only relates to Train Slots directly or materially affected by the relevant ROU; and
  - 32.3. must be submitted "no later than 4 weeks prior to the applicable Revision Finalisation Date".
33. **The Panel therefore found that a Revised Bid must be submitted by T-18. A Bid submitted after T-18 may be a Spot Bid but cannot be a Revised Bid.** (The content of a Revised Bid is dealt with in paragraphs 37 to 39 below).

### **Is a Bidder obliged to submit a Revised Bid after receiving a notification from Network Rail in accordance with Condition D4.8.2(c)(ii)?**

34. The wording of Condition D4.8.3 "Each Bidder **shall** [emphasis added], following receipt of notification from Network Rail under Condition D4.8.2(c)(ii) ....submit: a Revised Bid", appears to imply that there is no option for a Train Operator not to submit such a Revised Bid. That said, Condition D4.8.6 contemplates the possibility of no Revised Bid being submitted in accordance with Condition D4.8.3 by providing that "Network Rail shall be entitled as reasonably necessary to amend any Timetable Week Slot notified in accordance with Condition D4.8.2(c)(ii) and in relation to which no Revised Bid has been submitted to Network Rail by a Train Operator".
35. A Train Operator which chooses to make no Revised Bid, in effect to ignore the invitation in Condition D4.8.2(c)(ii), will have no grounds for action against Network Rail if it does not like Network Rail's "reasonably necessary" amendments to Train Slots.
36. **The Panel therefore found that notwithstanding the use of "shall" in Condition D4.8.3, a Train Operator is not required to submit a Revised Bid, in the sense that if it did not do so it would be in breach of the Network Code. However, if a Train Operator fails to submit a Revised Bid, it must accept the consequences of not doing so.**

### What information should a Revised Bid contain?

37. Given that a Revised Bid is a subset of a Bid, the Panel considered that it was reasonable that it should be subject to the provisions of Condition D3.3 "Contents of a Bid" which states

#### **"3.3 Contents of a Bid**

*A Bidder shall, in making a Bid, indicate, in respect of the Train Slots for which the Bid is being made, the extent of its requirements (if any) as to:*

- (a) dates on which the Train Slots are intended to be used;*
- (b) start and end points of the train movement;*
- (c) intermediate calling points;*
- (d) the times of arrival and departure from any point specified under paragraphs (b) and (c) above;*
- (e) railway vehicles to be used;*
- (f) train connections with other railway passenger services;*
- (g) the route to be followed;*
- (h) any Ancillary Movements;*
- (i) platforming at any points specified pursuant to paragraphs (b) and (c) above;*
- (j) any relevant commercial and service codes; and*
- (k) the maximum train speed, maximum train weight and maximum train length.*

38. The parties differed as to whether or not a Revised Bid should necessarily contain all the information listed under the 11 headings in Condition D3.3, and, in consequence, differed as to when a Revised Bid may be considered to have been made.

38.1. FGW argued that it was down to its discretion as to how many of the ingredients listed in Condition D3.3 it needed to specify, and made reference to other Train Operators that submitted what were called "specification bids" which Network Rail was content to act upon.

38.2. Network Rail made reference to correspondence that it had included in the submission where it had raised concerns that FGW was not submitting, with its Revised Bids, information that Network Rail considered it needed in order to carry out rational re-timings and avoid abortive work. In particular, it was of the view that efficient scheduling of platform and throat use at Paddington required that it be advised of FGW's needs in respect of types of rolling stock, Ancillary Movements and platforms. There was a non-meeting of minds as to whether this implied a requirement for e.g. fully worked rolling stock programmes, or merely sufficient information to identify potential next workings of incoming services.

39. The conclusion of the Panel was that

39.1. Condition D3.3 provides that "*A Bidder shall ... indicate ... the extent of its requirements (if any) as to ...*" a number of specified matters. It contemplates that the Bidder may have no requirements in respect of some of those matters, but does not require it to say so expressly. In principle, therefore, a Revised Bid, like any other Bid, need not include information under all the headings in Condition D3.3. Nevertheless, there will be certain matters in respect of which the Bidder must of necessity have a requirement. For example, a Spot Bid to run extra

trains for the FA Cup Final must state, as a requirement, the date or dates on which the Train Slots are intended to be used. However,

- 39.2. Network Rail was entitled to assume that the Bidder has no requirements beyond those specified in any Bid. Network Rail was therefore entitled to act on the basis that the information supplied at the time of the Bid represented the totality of the Bidder's requirements in relation to any Train Slot addressed in that Revised Bid. The Bidder must therefore be prepared for Network Rail to act upon the information that it has been given, and must accept the consequences if Network Rail does not take into account information that it has not been given;
- 39.3. if the Train Operator has not advised Network Rail of the total "extent of its requirements (if any)" by "no later than 4 weeks prior to the applicable Revision Finalisation Date", then "the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3"; and therefore the determination of the Panel is that
- 39.4. **a Revised Bid must specify the Bidder's requirements (if any) under Condition D3.3. If the Bidder specifies no requirements under one or more of the paragraphs within Condition D3.3, Network Rail is entitled to assume that it has none.**

#### **Is a Train Operator entitled to amend a Revised Bid; if so, what is the consequence?**

40. The Panel was also asked to consider the implications where a Train Operator submitted an initial Revised Bid, and followed it up with supplementary information. It was a significant part of Network Rail's contention that FGW was exercising its discretion in respect of Condition D3.3 and not supplying information (in particular in relation to rolling stock and platforming) that Network Rail considered was essential to the proper planning of services in the Paddington area, and that this was directly holding back "upload to TSDB at T-12".
41. On this the Panel found the following points to be determinative:
  - 41.1. the normal meaning, in common parlance, of the word "bid", as used for example in the context of an auction, is a statement of offer. If the bidder needs to vary, or augment, that bid, the revised bid is considered to be a new bid that necessarily replaces in its entirety the bid that has gone before.
  - 41.2. if the Track Access Bidder considers it necessary, at a later date, that additional requirements should be stipulated in respect of a Train Slot, then the effect is to vary or withdraw the previous bid and replace it with a "subsequent Bid". There is no objection to replacing a Revised Bid with a subsequent bid, but
    - 41.2.1. the replaced Bid would cease to have any standing as a Revised Bid,
    - 41.2.2. the subsequent Bid would only count as a Revised Bid, for the purposes of Condition D4.8.6 and Schedule 4, if it was submitted "no later than 4 weeks prior to the applicable Revision Finalisation Date" (i.e. by T-18).
42. In relation to information supplied subject to later amplification, the Panel's conclusion was that there is a difference between information that corroborates or amplifies that which has been supplied before, and that which makes a material alteration or addition to the terms of an earlier Revised Bid and requires Network Rail to review or re-edit relevant Train Slots materially.

43. For the reasons given above, where information of the second kind described in paragraph 42 is introduced after T-18, the effect is to replace the Revised Bid with a new bid which does not have the status of a Revised Bid. In practical terms, this would entitle Network Rail to deal with the new bid in one of two ways according to the circumstances
- 43.1. in accordance with the provisions of Condition D4.8.6, it would “*be entitled as reasonably necessary to amend any Timetable Week Slot notified in accordance with Condition D4.8.2(c)(ii) and in relation to which no Revised Bid has been submitted to Network Rail by a Train Operator*”; OR
- 43.2. in accordance with Condition D4.3, as a Spot Bid not falling to be considered under Condition D4.8.4(c).
44. **The Panel therefore found that**
- 44.1. **A material alteration or addition to the terms of a Revised Bid constitutes a new Bid replacing the Bid previously made. If the alteration or addition is made after T-18, the new bid will not be a Revised Bid.**
- 44.2. **If a Revised Bid has been superseded by another bid made after T-18, there will be no Revised Bid in respect of the relevant Train Slots.**
- 44.3. **The provision of further information by way of clarification or amplification of a Bid not involving a material alteration or addition to its terms will not normally constitute a new bid unless it requires Network Rail to revise or re-edit relevant Train Slot(s) materially.**

**In which possible circumstances may Network Rail conclude that a Revised Bid that it has received has not been “properly submitted”? In such circumstances, would this mean that “the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3”?**

45. The Panel considered that Condition D4.8.5 places certain obligations on Network Rail where “*it is in receipt of a Revised Bid which it considers to have been properly submitted to it in accordance with the provisions of this Condition D4.8.3*”. The Panel is of the view that this provision entitles, and indeed requires, Network Rail to formulate a view as to what, for the purposes of the operation of Condition D4.8, should be included in a “*properly submitted*” Revised Bid. Furthermore, it would then be logical and reasonable that such a specification
- 45.1. should be set by reference to Condition D3.3 as regards content, and
- 45.2. should be consulted with Train Operators, either as part of the agreement of “*agreed criteria*” under Condition D4.8.2(b), or through the processes in Condition D2.2 to establish the Rules of the Plan;
- 45.3. would entitle Network Rail reasonably to require, for example that in relation to the working arrangements at large and complex stations, a Train Operator must declare its requirements in respect of e.g. platforming as a necessary part of a “*properly submitted*” Revised Bid. The test of the reasonableness of such a specification would be whether or not it protected Network Rail from a need to do abortive work or re-work, as a result of insufficient or revised bidding requirements.

46. In reaching this point, the Panel concluded that Network Rail should reasonably have the right, for a given set of circumstances, to define, by reference to Condition D3.3, what minimum information should be included in Revised Bids associated with a particular ROU or ROUs. This is categorically not saying that Network Rail can require all Revised Bids to contain information under every head in Condition D3.3. It follows from this that
- 46.1. Network Rail could reasonably stipulate, as part of the processes in fulfilment of Condition D4.8.2(b), which information heads under Condition D3.3 it considered to be “mission critical” for particular ROUs, and therefore to form part of the “*agreed criteria*”;
  - 46.2. were this discretion to be exercised unreasonably then, like any decision of Network Rail made under Part D, it could be grounds for making an appeal to the relevant ADRR panel under the provisions of Condition D5;
  - 46.3. where such information was unreasonably not included as part of the Revised Bid, Network Rail would be entitled to treat the resultant Revised Bid as not “*properly submitted*”;
  - 46.4. it would be reasonable for Network Rail to consider that a Revised Bid had not been properly submitted if it did not contain information, whether or not forming part of the “*agreed criteria*”, the absence of which could reasonably be foreseen to impose unreasonable burdens or delays on Network Rail in formulating an amended timetable. For example, in some instances this might be the case where a Revised Bid did not include any details of the desired platforming, Ancillary Movements and relevant stock workings affecting the workings of a mainline terminus.
47. Where Network Rail, did not “*consider a Revised Bid to have been properly submitted*” (and no subsequent Bid had been submitted before “*4 weeks prior to the applicable Revision Finalisation Date*”) it would be entitled (subject only to the provisions of D4.8.6) to amend notified Train Slots as if “*no Revised Bid has been submitted to Network Rail by a Train Operator in accordance with Condition D4.8.3*”, and, so long as it acted reasonably and in good faith, such actions would not be subject to a right of the Train Operator to “*make a reference to the relevant ADRR panel...*”.
48. **The Panel therefore concluded that**
- 48.1. **when carrying out the consultation required in Condition D4.8.2(b), including the setting of “*agreed criteria*”, Network Rail is entitled to consider and stipulate what, for the purposes of Condition D4.8.5, should be the content of a Revised Bid “*properly submitted*”, and in deciding whether a Revised Bid has actually been “*properly submitted*” for the purposes of that Condition D4.8.5, Network Rail must act reasonably and fairly. Fairness requires that it should treat all Industry Parties affected by the same ROUs, and with rights to operate over a specified route, equally.**
  - 48.2. **it would be reasonable for Network Rail to conclude that a Revised Bid had not been properly submitted if the effect of the Bidder having failed to state its requirements under one or more of the paragraphs of Condition D3.3 could reasonably be seen to impose on Network Rail unreasonable burdens or delays in formulating an amended Timetable;**
  - 48.3. **where Network Rail, acting reasonably, concludes that a Revised Bid has not been “*properly submitted*”, this will mean in practice that “*the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3*”.**

**What therefore are the circumstances that might satisfy the “but for” test in relation to the force of “because” in Schedule 4, paragraphs 4.1(b)(iii) and 4.2(b)(ii), discussed in 25 above?**

49. Having formed its view on what might constitute a “properly submitted” Revised Bid, and therefore the circumstances where a Train Operator might be considered to have “failed” to submit a Revised Bid, the Panel considered further the issue of **causation**, arising out of the use of the word “**because**” in Schedule 4, paragraphs 4.1(b)(iii) and 4.2(b)(ii).
50. The Panel judged that this issue could only be determined in relation to the extent and definition of Network Rail’s associated powers in the generality of Part D, and in Condition 4.8 in particular.
  - 50.1. The Panel was satisfied that, to state the extreme case, were Network Rail to be prevented from uploading to TSDB at T-12 because of a catastrophic failure of systems, a coincidental omission of a Revised Bid from a Train Operator would not satisfy the “but for” test, and would not entitle Network Rail to claim the benefit of either paragraph 4.1(b)(iii), or paragraph 4.2(b)(ii) of Schedule 4.
  - 50.2. The Panel considered that it was unlikely that the “but for” test would be satisfied in a case where, for example, a bid had failed to qualify as a Revised Bid only because the Train Operator had narrowly missed the T-18 deadline.
  - 50.3. On the other hand, the Panel could envisage that a Train Operator might give notice of its intention to revise or supplement its requirements in a way which would result in its Revised Bid being replaced after T-18, and might then so delay in carrying out that intention as to make it unreasonable to expect Network Rail to be able to upload to TSDB by T-12. In such a case the “but for” test would be satisfied.
51. In practice the Panel considered that the “but for” test would not often be satisfied, because Network Rail, as the “directing mind” managing the timetabling process, was potentially in a position to control the factors influencing which Notification Factor should apply in respect of all ROUs, except perhaps those needed to deal with genuine short term emergencies. This is because
  - 51.1. Network Rail promotes, consults on, and, depending on the outcome of any dispute resolution, promulgates the applicable Rules of the Route;
  - 51.2. Network Rail, subject to the requests of individual Train Operators in respect of particular ROUs (and subject to the possibility of appeal to an ADR Panel), determines the content of the First Working Timetable;
  - 51.3. Network Rail controls, directly, or through contract, the planning of all work necessitating ROUs;
  - 51.4. Network Rail, under the terms of Condition D4.8.1, controls the deadlines for the completion of those aspects of the Timetable Revision process not otherwise subject to explicit deadlines in Condition D4.8, and also determines (subject to appropriate consultation e.g. through the medium of Draft Period Possession Plan (“DPPP”), “trains meetings”, and Confirmed Period Possession Plan (“CPPP”))
    - 51.4.1. the “*proposed structure for the amended train plan for the relevant Timetable week*” (Condition D4.8.2(c)(i)), and
    - 51.4.2. which Train Slots might require to be the subject of a Revised Bid from the Train Operator;

- 51.5. the Train Operators are the directing minds in respect of the content of Revised Bids which are, or are not, submitted by “no later than 4 weeks prior to the applicable Revision Finalisation Date”, but, as identified above, can reasonably be asked to conform to certain “agreed criteria”. However, thereafter,
- 51.6. Network Rail’s discretions in respect of acceptance or modification of “a Revised Bid which it considers to have been properly submitted to it in accordance with the provisions of this Condition D4.8.3” are constrained only by Condition D4.8.5,
- 51.7. after that, the remaining requirement for Network Rail to notify the Train Operators of its decisions by the Revision Finalisation Date, i.e. four weeks after the receipt of the last Revised Bid (Condition D4.8.7), is a matter within the control of Network Rail,
- 51.8. the final right of the Train Operators to accept or reject those decisions by no later than the Revision Response Date (i.e. a further 7 days) (Condition D4.8.8) may not be within the control of Network Rail, but, depending upon the number of Train Slots in dispute, is unlikely, of itself, to be a factor that would cause Network Rail to be unable to upload TSDB at T-12.
52. This analysis of the extent of Network Rail’s entitlement and scope to direct and control the **Supplemental Timetable Revision Process**, led the Panel to the following conclusion:
- 52.1. Network Rail is the directing mind for most of the stages in the **Supplemental Timetable Revision Process**, and in a position to deliver compliance with all deadlines except the submission of Revised Bids at T-18;
- 52.2. In respect of the form and content of Revised Bids, Conditions D4.8.2(b) and D4.8.5 entitle Network Rail to stipulate the form of a “properly submitted” Revised Bid, whilst Conditions D4.8.5 and D4.8.6 empower Network Rail to act in circumstances where a Revised Bid has NOT been “properly submitted”. Taken together, therefore
- 52.3. Network Rail should be in a position to be master of circumstances in respect of delivery of deadlines, and able satisfactorily to discharge any onus of proof that the necessary qualifying conditions have been met for whichever of the Notification Factors should be applied.
- 52.4. if all else fails in respect of controlling this process Network Rail has the duty, under Condition 9, paragraph 3(b) of its Licence to “notify the Office of Rail Regulation if the licence holder considers that any non-compliance by a train operator with its contractual or licence obligations in relation to the procedures referred to in paragraph 2 is wilful or persistent and is likely to prevent it complying with paragraph 2(b)” [as quoted at paragraph 4 above].
53. **The Panel therefore concluded that given the discretions and authorities at Network Rail’s disposal in the operation of Condition D4.8.2, instances when a failure to “upload to TSDB at T-12” is “because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3”, and the “but for” test is therefore satisfied, are likely to be specialised and infrequent.**
54. Finally the Panel considered that, given that Part D of the Network Code relates to a multilateral process that is operated for Network Rail and all Train Operators,
- 54.1. there is an obligation upon Network Rail to operate the process so as to achieve a regular ability to upload to TSDB by T-12;



- 54.2. there is a reciprocal obligation on the Train Operators to act, in particular in the supply of information, in a way that does not make Network Rail's delivery of its obligations more difficult to achieve;
- 54.3. there is no provision in any of the contractual documents to relieve Network Rail of its obligation (i.e. the contractual deadlines must define the level of resource provided, rather than the resources employed determining the level of compliance); however,
- 54.4. any other extraneous factors would always be secondary to the goal of regular achievement of "upload to TSDB at T-12".

### **The Panel's overall conclusions**

- 55. In respect of the Timetable weeks in dispute between the parties, it is the perception of the Panel, based upon a first consideration of the submissions, and without the benefit of a detailed forensic examination of each individual instance, that
  - 55.1. there has not been a clear understanding between the Parties of what constitutes "*a Revised Bid which [Network Rail] considers to have been properly submitted to it in accordance with the provisions of this Condition D4.8.3*";
  - 55.2. there have been circumstances where Revised Bids have been amended or supplemented to a degree, and to timescales, that would compromise their qualification to be Revised Bids;
  - 55.3. there have been instances where overall control of the process appears to have been governed by an instinct, or a tradition, of "reasonableness" that may have contributed to an inadequately regimented control of the operation of Condition D4.8; and that
  - 55.4. the actions of FGW may, on occasions, have been such that "*the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3*"; and that it is "because" of this that Network Rail did not achieve "upload to TSDB by T-12". However,
    - 55.4.1. determination of whether or not there has actually been such failure, and whether there is a causal relationship with the timing of the upload to TSDB, requires analysis on the basis of the specific instances for which data has already been collated by the Parties;
    - 55.4.2. this does not change the basic principle that Network Rail still has to demonstrate that it has fulfilled sufficient conditions to qualify for Notification Factors from columns D or C; in particular
    - 55.4.3. contributory failings by the Train Operator do not, of themselves, cause the NF to default to the column C values.
  - 55.5. such analysis will be part of a wider analysis of the facts in relation to the exercise, by both Network Rail and FGW, of their entitlements and obligations, as clarified in the preceding paragraphs of this determination, bearing in mind that the prime responsibility, and ability, to deliver the **Supplemental Timetable Revision Process** rests with Network Rail.

### **The Panel's interim Determination on matters of entitlement**

56. The Parties are directed to re-assess the significance of the data contained in the joint submission, informed by the following findings of the Panel in respect of their respective entitlements under Schedule 4 and Condition D4.8:
- 56.1. a Revised Bid must be submitted by T-18. A Bid submitted after T-18 may be a Spot Bid but cannot be a Revised Bid;
  - 56.2. a Revised Bid must specify the Bidder's requirements (if any) under Condition D3.3. If the Bidder specifies no requirements under one or more of the paragraphs within Condition D3.3, Network Rail is entitled to assume that it has none;
  - 56.3. notwithstanding the use of "shall" in Condition D4.8.3, a Train Operator is not required to submit a Revised Bid, in the sense that if it did not do so it would be in breach of the Network Code. However, if a Train Operator fails to submit a Revised Bid, it must accept the consequences of not doing so;
  - 56.4. a material alteration or addition to the terms of a Revised Bid constitutes a new Bid replacing the Bid previously made. If the alteration or addition is made after T-18, the new bid will not be a Revised Bid;
  - 56.5. if a Revised Bid has been superseded by another bid made after T-18, there will be no Revised Bid in respect of the relevant Train Slots;
  - 56.6. the provision of further information by way of clarification or amplification of a Bid not involving a material alteration or addition to its terms will not normally constitute a new bid unless it requires Network Rail to revise or re-edit relevant Train Slot(s) materially;
  - 56.7. when carrying out the consultation required in Condition D4.8.2(b), including the setting of "agreed criteria", Network Rail is entitled to consider and stipulate what, for the purposes of Condition D4.8.5, should be the content of a Revised Bid "properly submitted", and in deciding whether a Revised Bid has actually been "*properly submitted*" for the purposes of that Condition D4.8.5, Network Rail must act reasonably and fairly. Fairness requires that it should treat all Industry Parties affected by the same ROUs, and with rights to operate over a specified route, equally;
  - 56.8. it would be reasonable for Network Rail to conclude that a Revised Bid had not been properly submitted if the effect of the Bidder having failed to state its requirements under one or more of the paragraphs of Condition D3.3 imposed on Network Rail unreasonable burdens or delays in formulating an amended Timetable;
  - 56.9. where Network Rail, acting reasonably, concludes that a Revised Bid has not been "*properly submitted*", this will mean in practice that "*the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3*";
  - 56.10. the column C Notification Factor applies only where the facts of the case fit the wording of paragraph 4.1 of Schedule 4. If they do not (for example, because the ROU was not reflected in the First Working Timetable, and this was not because of a request by FGW that it should not be) Network Rail cannot claim the benefit of column C whatever FGW's shortcomings may have been;

- 56.11. the use of the word “because” in paragraphs 4.1(b)(iii) and 4.2(b)(ii) of Schedule 4 to the Track Access Contract means that the column C (or as the case may be D) NF applies only where Network Rail’s failure to upload to TSDB by T-12 has been caused by FGW’s failure to submit a Revised Bid by T-18 (taking account of all that is said in this determination). A “but for” test should be applied. This test would not be satisfied if it appeared that the true cause was a complete failure of Network Rail’s systems. It would be unlikely to be satisfied if what FGW had prepared and intended as a Revised Bid failed to qualify as such only because it was submitted a day late.
- 56.12. given the discretions and authorities at Network Rail’s disposal in the operation of Condition D4.8.2, instances when a failure to “upload to TSDB at T-12” is “*because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3*”, and the “but for” test is therefore satisfied, are likely to be specialised and infrequent.
- 56.13. Schedule 4, and in particular paragraphs 5 and 4, are drafted on the basis that a) all ROUs require Network Rail to pay compensation to the Train Operator; b) the extent to which the compensation factor is reduced by one Notification Factor rather than another depends largely on steps to be taken by Network Rail; accordingly c) the onus of proof is on Network Rail to demonstrate that those steps were taken to justify application of a particular Notification Factor.
57. For the avoidance of doubt, the Panel is of the view that at this stage it is not required, and is indeed not yet in a position, to make any decisions upon remedy (AD Rule A1.72(g)(ii)). In reaching, and publishing (in accordance with Rule A1.78), this determination, the Panel considers that it has provided the Parties, in paragraphs 28 to 54 above, with appropriate clarification of the proper construction to be placed on the provisions of Condition D4.8 insofar as they relate to the respective entitlements and obligations of the parties in respect of the preconditions to the operation of Schedule 4. In consequence the Parties, individually or jointly, have the following options:
- 57.1. to challenge the determination by means of an appeal to the Office of Rail Regulation in accordance with the provisions of Condition D5.2;
- 57.2. to accept the determination, and to review the facts of the weekly instances, in the light of this determination, with a view to agreeing the Notification Factors applicable;
- 57.3. in the event that the process in 57.2 does not enable the Parties to resolve their differences the Parties are invited to return to the Panel for the appointment of an assessor, and if thereafter still unable to agree, to refer the matter back to the Panel for a determination on the facts; and
- 57.4. in the event that such a further determination is still not acceptable to one Party, that Party may then take unresolved matters to an Arbitrator appointed in accordance with paragraph 8.4(c) of Schedule 4.
58. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.

**George Renwick**  
**Panel Chairman**